

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK NISTLER

Claimant

VS.

FOOTLOCKER, INC.

Respondent

AND

AMER. CASUALTY CO. OF READING, PA)

Insurance Carrier

Docket No. **1,024,626**

ORDER NUNC PRO TUNC

This case comes before the Board on remand from the Court of Appeals. The Court of Appeals' opinion was filed November 21, 2008. Both parties submitted briefs and the Board heard oral argument on April 22, 2009.

ISSUES

The Board in its August 30, 2007 Order calculated Nistler's post-injury wage based upon a finding that he was a full-time hourly employee and his post-injury average weekly wage should be based upon a 40-hour workweek as he was regularly expected to work 40 hours although he frequently worked less than a 40-hour workweek. The Court of Appeals affirmed the finding that Nistler was a full time employee but determined that the statutory method to determine pre-injury average weekly wage was not applicable to the determination of the post-injury average weekly wage. Instead, the Court of Appeals determined Nistler's post-injury average weekly wage should be based upon actual hours worked and not a hypothetical 40-hour workweek. Consequently, the Court of Appeals remanded the case for further proceedings to determine Nistler's post-injury average weekly wage, his resulting wage loss, and permanent partial disability benefits. The parties filed additional briefs and the Board held an additional oral argument.

Respondent argued that the mandated actual post-injury wage calculation required a weekly assessment of Nistler's post-injury average weekly wage. And in this instance it was noted that there were some weeks post-injury where Nistler earned more than 90 percent of his pre-injury average weekly wage and would only be entitled to his functional impairment for that week pursuant to K.S.A. 44-510e(a). Respondent recognized that such a calculation method would be cumbersome where the average weekly wage fluctuates

each week and, consequently, the corresponding disability percentage would change weekly. Nevertheless, this is what respondent contends the law requires.

Nistler agrees that a week to week calculation would be cumbersome but he argues determination of the actual post-injury average weekly wage should be based upon an average of the actual wages earned during the post-injury employment and that such an approach was approved in *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

The issues for Board determination are the claimant's post-injury average weekly and corresponding permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The evidentiary record establishes that postinjury there were certain weeks where Nistler earned 90 percent or more than his preinjury average weekly wage. But the evidentiary record further establishes that most of the time Nistler was earning less than 90 percent of his preinjury average weekly wage.

K.S.A. 44-510e(a) provides that an injured worker is limited to the functional impairment if postinjury he is engaging in any work for wages equal to 90% or more of the preinjury average gross weekly wage. Consequently, respondent argues that each individual week where Nistler earns 90% or more than his preinjury average gross weekly wage there must be a re-calculation of his permanent partial disability limiting him to his functional impairment for that week.

Initially, it should be noted as a general rule, in the calculation of permanent partial general disability compensation, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

But the amount of compensation does not change whether the benefits are for work disability or functional impairment, instead when the injured worker's status changes due to changes in the work disability percentage or from work disability to functional impairment the only change under the current statute is the length of time the employee is entitled to receive benefits. In this instance, because of the limited number of weeks that Nistler was

earning 90% or more than his preinjury average weekly wage, there would be no gap in his entitlement to benefits whether his compensation for a particular week was based upon his percentage of functional impairment or his percentage of work disability.

But more importantly, in *Graham*¹ the Supreme Court noted that K.S.A. 44-510e specifically refers to gross weekly wage averages. The Supreme Court stated:

The Court of Appeals panel also reexamined claimant's postinjury records and found that on certain weeks, he earned 90 percent or close to 90 percent of his preinjury wages. 36 Kan. App.2d at 527, 141 P.3d 1192. In doing so, the panel implicitly rejected the apples to apples approach of the Board and ALJ, i.e., comparing preinjury and postinjury weekly *averages* rather than comparing a preinjury average to cherry-picked postinjury weeks. Again the plain language of the statute did not support the panel's method; the statute repeatedly references gross weekly wage averages.

Simply stated, the determination of claimant's actual post-injury average weekly wage, where the weekly wage fluctuates, contemplates a calculation of an average earned over a period of time in order to accurately assess the actual post-injury average wage.

In this case, the parties stipulated that Nistler's pre-injury average weekly wage was \$652.47. After his accident in November 2004, Nistler remained in the receiving department but only worked 6 hours a day as a sorter for approximately six weeks. Nistler then returned to working the same pre-injury hours but performing light-duty work training other employees. The Court of Appeals made the finding that Nistler's average weekly wage was \$444.17 for this time period. The Court of Appeals noted:

For the first 32 weeks, relegated to light duty, he averaged 32.55 hours per week and \$444.17 in weekly wages.

The \$444.17 actual post-injury weekly wage, when compared to claimant's pre-injury average weekly wage of \$652.47, results in a 32 percent wage loss for this time period.

On June 28, 2005, Nistler's job classification changed to a material handler I. The Court of Appeals determined:

From June 28, 2005, to June 17, 2006, Nistler's average weekly wages were \$468 and he averaged 32.48 hours per week. From June 18, 2006, until February 10, 2007 (1 month after the regular hearing), he averaged 33.2 hours and \$481.85 per week.

¹ *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

Consequently, for the time period from June 28, 2005, through June 17, 2006, Nistler's post-injury average weekly wage was \$468 and when compared to his pre-injury average weekly wage of \$652.47, results in a 28 percent wage loss.

Finally, for the time period after June 18, 2006, Nistler's post-injury average weekly wage was \$481.85 and when compared to his pre-injury average weekly wage of \$652.47, results in a 26 percent wage loss.

Because Nistler's post-injury average weekly wage was less than 90% of his preinjury average weekly wage he is entitled to compensation for a work disability (a permanent partial general disability greater than the functional impairment rating). The work disability is determined by averaging the task loss with the wage loss.²

In this instance, the Court of Appeals noted that Nistler's task loss is 82.8 percent. The Court of Appeals stated:

In this appeal, Nistler's functional disability equal to an 82.8% task loss is not in issue. Likewise, his average weekly wage of \$652.42 on the date of the injury is not disputed.

Accordingly, from the date of accident through June 27, 2005, Nistler is entitled to compensation for a 57.5 percent work disability based upon an 82.8 percent task loss and a 32 percent wage loss. From June 28, 2005, through June 17, 2006, Nistler is entitled to compensation for a 55.5 percent work disability based upon an 82.8 percent task loss and a 28 percent wage loss. After June 18, 2006, Nistler is entitled to compensation for a 54.5 percent work disability based upon an 82.8 percent task loss and a 26 percent wage loss.

Again, as previously noted, the claimant's work disability changes several times but due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due, therefore, this award simply uses the final percentage of permanent partial general disability to compute the total number of weeks of permanent partial disability compensation.

AWARD

WHEREFORE, it is the decision of the Board that the claimant is entitled to compensation for a work disability as noted above.

² K.S.A. 44-510e(a).

The claimant is entitled to 226.18 weeks of permanent partial disability compensation at the rate of \$435 per week or \$98,388.30 for a 54.50 percent work disability, which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy W. Ryan, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier